VET.APP. No. 15-3647

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JIMMY L. HENRY,
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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ON APPEAL FROM THE
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BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (Board) August 7, 2015, decision to deny Appellant's claim of entitlement to Department of Veterans Affairs (VA) benefits for a low back disorder.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant, Jimmy L. Henry, appeals an August 7, 2015, decision of the Board that denied entitlement to service connection for a low back disorder. Record Before the Agency [R.] at 1-11.

Before the Court, Appellant raises a number of issues, to include his principal contention that the Board failed to adequately explain its reliance on an inadequate VA medical examination to deny his claim for benefits. *See* Appellant's Brief (App.Br.) at 5-12. It is the Secretary's position, for the reasons set forth below, that the Court should affirm the Board's decision. Given Appellant's explicit contentions of error, the Secretary will focus his response accordingly. Claims not argued on appeal are deemed abandoned. *McPhail v. Nicholson,* 19 Vet.App. 30, 33 (2005).

B. Statement of Relevant Facts

Appellant had active military service from January 1974 to September 1977 and from August 1987 to August 1990. [R. at 59-60]. He also had additional service in the Texas Air National Guard. *See* [R. at 3]. Service treatment records (STRs) indicate that on February 12, 1989, Appellant underwent excision of a ganglion cyst on his right ankle. [R. at 250-51 (174-463)]. The following day, he was treated for a spinal headache indicated to be a result of anesthesia. *Id.* Treatment with a caffeine solution was without resolution of the headache. Appellant was then treated on February 17, 1989,

with a "blood patch," which resolved his headache. *Id.* The hospital record indicates that Appellant did suffer from some pain in the lower lumbar spine, which was noted to have resolved overnight. Treatment notes further indicate that at discharge on February 18, 1989, Appellant was reported to be without a headache and with "markedly decreased lumbar pain." *Id.* On follow-up, on February 23, 1989, and on March 7, 1989, treatment notes indicate that Appellant's excision wound was well healed, and he was assessed as "doing well," with no further complaints noted in connection with either a spinal headache or low back pain. [R. at 248, 253].

In February 1991, Appellant complained of low back pain. [R. at 326]. At that time, treatment notes specifically indicated no history of previous trauma. An assessment of lumbar strain was provided. *Id.* Appellant was treated with bed rest and moist heat. *Id.* Corresponding private treatment records also indicated an assessment of lumbar strain, from overuse. [R. at 474]. Neurological examination and muscle strength testing of the major muscle groups were reported as normal. *Id.* In April 1991, Appellant underwent a non-flight periodic medical examination. [R. at 335-38]. On clinical examination, his lower extremities and spine were reported as normal. [R. at 335]. Appellant denied any recurrent back pain. [R. at 337].

Private treatment records show that in June 1993, Appellant complained of mid-epigastric pain, at times radiating into his back. [R. at 476]. He was diagnosed with persistent gastritis pain. *Id.* In December 1994, Appellant

presented with complaints of low back pain and gastritis. [R. at 477-78]. The pain was described as non-radiating, and Appellant was assessed as being in no acute distress. *Id.* On physical examination, Appellant had complete active and passive range of motion in the low back, and straight leg testing was negative, bilaterally. *Id.* An abdominal examination was unremarkable. The examiner indicated that Appellant should return for follow up to include the possibility of performing additional gastrointestinal testing, with a possible referral to gastroenterology for possible scoping. *Id.* In February 1995, the examiner provided an impression of back strain in connection with Appellant's complaints of pain. [R. at 479-81]. Later that month, his back strain was assessed as "now almost completely resolved." [R. at 481]. In August 1998, Appellant presented with complaints of intermittent low back pain for the past month. He reported that he had been more active lately and thought that he "may" have injured his back. On objective examination, straight leg raising tests were reported as negative, bilaterally, with neurologic examination reported as unremarkable. *Id.*

The record also shows that in September 1995, in connection with his continued retention in the Air National Guard, Appellant certified that he currently had no medical problems and had none since his last periodic examination. *See* [R. at 371 (367-75)]. He was thereafter cleared for World Wide Duty. [R. at 367-68]. In a May 1996 non-flight periodic medical examination, Appellant's lower extremities and spine were reported as normal on clinical evaluation. [R. at 377-

84]. In the Medical History portion of the examination, Appellant denied recurrent back pain. R. at 383].

In September 2000, while engaging in his civilian occupation, Appellant developed low back pain from lifting a tire. [R. at 433-34]. He was diagnosed with "L3/L4 radiculopathy, secondary to disc herniation at L3/L4." *Id.* Surgery was recommended. *Id.* Appellant underwent surgery in December 2000. [R. at 436-38]. In a March 2001 private treatment record, the examiner opined that Appellant was unable to return to his work as an airplane mechanic because of the bending and lifting required by his job. [R. at 455-56; *see also* 457-58]. In December 2001, in connection with his World Wide Duty Evaluation, Appellant reported the surgery to his lower back. [R. at 452 (445-54)]. In March 2002, Appellant was determined to be medically disqualified for World Wide Duty. *See* [R. at 168 (162-70)].

Appellant filed an application for VA disability benefits for his back disability in August 2002. [R. at 1274-89]. The Regional Office (RO) denied the claim in a rating action dated in November 2002. [R. at 1014-19]. Appellant filed a notice of disagreement (NOD) in August 2003. [R. at 998]. In a statement dated in March 2004, Appellant claimed that his lower back condition was caused when the anesthesiologist punctured a hole in his spinal cord in connection with the in-service ankle surgery performed in 1989. [R. at 981]. A Statement of the Case (SOC) was issued in September 2004. [R. at 965-79]. Appellant filed his appeal in October 2004. [R. at 958].

In a decision dated in October 2014, the Board remanded Appellant's claim for further development, to include the conduct of a VA examination for the purpose of ascertaining whether a relationship exists between Appellant's current disability and his in-service complaints of pain in the lumbar spine. [R. at 464-68]. A VA examination was conducted in December 2014. [R. at 35-45]. Following a physical examination, Appellant was diagnosed with lumbar spondylosis, L3-4, with herniated disc, status post discectomy, with residuals, and with degenerative disc disease, L4-5, L5-Si, with facet hypertrophy. *See* [R. at 44].

The VA examiner indicated his review of Appellant's medical records, to include his STRs. [R. at 35]. The VA examiner opined that Appellant's current lumbar spine disability was less likely than not related to his claimed in-service injury. [R. at 36-37]. Here, the VA examiner explained that the spinal block administered in connection with the 1989 in-service surgery, resulted in a severe headache that was treated successfully with a "blood patch." *Id.* The VA examiner described this procedure as involving a veno-puncture and injecting a small amount of the patient's own blood into the previous lumbar puncture site to help aid in clotting off the leak causing the headaches. *Id.* The VA examiner opined that in Appellant's case, the procedure was successful and explained that any failure would have been immediately apparent, and other measures would have been taken. *Id.* He explained that any danger to the neural structure was minimal in any event because the anesthesia is usually administered at the L2-3

region and the spinal cord ends at least two levels above that area. *Id.* The VA examiner further explained that in Appellant's case, there was no follow-up required or documented, and no reported complications. *Id.*

The VA examiner's review included his observation that the one event documented on February 3, 1991 of acute strain to the lumbar spine, when Appellant was employed in a civilian capacity as an aircraft mechanic, had no neurologic component. [R. at 36]. He further observed that subsequently, during the April 1991 non-flight periodic examination, there were no clinical findings of any back problems and Appellant denied any such problems. [R. at 37]. The examiner noted that Appellant qualified for World Wide Duty at that time. *Id.* He noted that the same findings were also made in connection with the non-flight periodic evaluations conducted in September 1995 and May 1996. *Id.* However, as indicated by the VA examiner, he did not qualify as a result of the L3-4 discectomy performed in December 2000. *Id.* The examiner noted the diagnosis made in March 2011 by a private neurosurgeon in connection with a workmen's compensation claim and Appellant's ultimate release from the Air Force Reserves in March 2002. *Id.* The examiner also noted that there was no medical or biomedical evidence of record of any chronic or on-going condition associated with or aggravated by Appellant's military service. *Id.*

An addendum opinion was requested because the VA examiner did not indicate his review of Appellant's complaints of lower back pain made in connection with his February 1989 surgical procedure. [R. at 32-33]. Here, in a

January 2015 opinion, the VA examiner noted that there were no complications reported in connection with the February 1989 procedure, to include back pain. [R. at 31]. The examiner also noted that there were no other reported complaints of back problems during Appellant's period of active service. *Id.* The VA examiner reiterated his previous findings as they related to the non-flight period examination performed in April 1991, September 1995, and May 1996, where Appellant denied back pain, and accompanying clinical examination showed a normal spine, with Appellant's qualifying for World Wide Duty. *Id.* The examiner opined that Appellant's subsequent release from reserve duty was clearly made in connection with a 2000 workmen's compensation issue related to disability caused by a work-related injury, and that there was no medical evidence of a chronic or on-going condition associated with Appellant's military service, and no competent evidence to support a finding of nexus. *Id.*

In February 2015, the RO issued a Supplemental SOC. [R. at 18-29]. The Board issued its decision in August 2015. This appeal ensued.

III. SUMMARY OF THE ARGUMENT

For the reasons stated below, the Court should affirm the August 7, 2015, Board decision on appeal.

IV. ARGUMENT

A. Applicable Law

Generally, establishing service connection on a direct basis requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2)

an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

It is the Board's responsibility, as factfinder, to determine the credibility and weight to be given to the evidence. *See Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that the Board is responsible for assessing the credibility and weight of evidence and that the Court may overturn the Board's decision only if it is clearly erroneous). As the finder of fact, the Board may appropriately place greater probative weight on certain aspects of the record that it finds persuasive. *Owens v. Brown,* 7 Vet.App. at 433. In evaluating the evidence, the Board may properly discount a Veteran's lay testimony if it conflicts with the Veteran's service records, and it may weigh that testimony against an absence of evidence in the record. *Buchanan v. Nicholson,* 451 F.3d 1331, 1337 (Fed. Cir. 2006).

Board determinations with respect to the weight and credibility of evidence are "factual determination[s] going to the probative value of the evidence." *Layno v. Brown*, 6 Vet.App. 465, 469 (1994). Factual determinations by the Board will not be overturned unless found to be clearly erroneous. *Butts v. Brown*, 5 Vet.App. 532, 534 (1993) (en banc) (holding that the Court reviews findings of fact under the "clearly erroneous" standard of review).

B. Inadequate Medical Examination

Appellant argues that the Board failed to adequately explain its reliance on what he contends is an inadequate medical opinion. (App.Br. at 5-12). He contends that the VA examination is inadequate because the examiner did not reconcile his opinion with what Appellant contends is medical evidence that is contrary to that relied on by the examiner in forming his opinion. He contends that this evidence establishes that he has suffered back problems since his 1989 in-service surgical procedure. Nevertheless, contrary to Appellant's assertions, the 2014 VA examination report is not contradicted by the evidence of record, but is, in fact, consistent with that evidence. Regardless, Appellant, through counsel relies on his own lay assertions to rebut the findings of the VA examiner, and otherwise, as determined by the Board, points to no competent evidence that is contrary to that of the VA examination report. *See, e.g., Kern v. Brown,* 4 Vet.App. 350, 353 (1993) ("[A]ppellant's attorney is not qualified to provide an explanation of the significance of clinical evidence."); *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (rejecting appellant's contentions of inadequate examination where he failed to demonstrate that he possessed the competence to rebut a medical opinion). Appellant bears the burden of demonstrating error on appeal. *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), ***aff'd per curiam,*** 232 F.3d 908 (Fed.Cir. 2000) (table). Where, as here, Appellant has not done so, the Court must affirm.

It is well settled law that a medical "examination or opinion is adequate where it is based upon consideration of the [V]eteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (quotations omitted); *see also Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that "a medical report must not contain only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.").

Appellant argues generally that the December 2014 VA examination is inadequate and that the Board erred in its reliance on it. *See* (App.Br. at 5-12). The VA examiner's report is, however, consistent with the Court's case law on the matter, as it specifically indicated the examiner's detailed review of Appellant's claims file as to his claimed disability, to include Appellant's medical history, the results of the physical examination conducted in connection with the requested opinion, and an opinion as to service connection, followed by a rationale. [R. at 35-45]. Nothing further was required of the examiner. *See Stefl,* 21 Vet.App. at 123 ("An opinion is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one."). Moreover, case law is clear that both this Court and the Board are entitled to presume an examiner's competence absent

clear evidence to the contrary to render the necessary diagnoses. *Cox v. Nicholson*, 20 Vet.App. 536, 569 (2007). Similarly, there is no reasons-or-bases requirement for medical examiners. *See Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2010) (noting that medical reports "must be read as a whole" in determinations of adequacy).

As previously indicated, the VA examiner, in the December 2014 VA examination report and January 2015 addendum, explained that the February 1989 complaints of back pain following the application of a "blood patch," to alleviate his complaints of a severe headache that was experienced as a result of the anesthesia used during the excision of a right ankle ganglion cyst, involved no neurological component. [R. at 36-38 (35-45)]. If there had been such a complication, the effect would have been immediate, and, here, there was no follow-up required, and no complications reported. *Id.; see also* [R. at 248-53]. Following service, Appellant experienced an event in February 1991, involving documented acute strain to the lumbar spine; however there was no neural component involved there, and, in April 1991, the protocol examination conducted in connection with Appellant's retention in the Air National Guard showed no clinical findings of a back disorder, nor did Appellant complain of back pain. *Id.; see also* [R. at 326, 474, 335-38]. The pattern spoken to by the VA examiner involved Appellant's private treatment for back pain, where during subsequent protocol examinations, there were no clinical findings of a back disorder, no complaints of back pain indicated by Appellant, and no indication of

neurological involvement made in connection with the private treatment reports. [R. at 36-37]. Despite acknowledgement of the reports of back pain made in 1994, Appellant was evaluated successfully for World Wide Duty in September 1995 and again in May 1996. *See* [R. at 367-68, 477-78]. It was not until the neurological involvement experienced as a result of the September 2000 work-related injury that this "pattern" changed, and Appellant was determined to be medically disqualified for continued retention in the Air Force reserves. [R. at 36-37; *see also* R. at 428-38: documentation associated with workmen's compensation claim]. Therefore, as opined by the VA examiner and determined by the Board, the facts presented fail to demonstrate documentation of a chronic or on-going condition associated with Appellant's active military service. [R. at 31, 36-37].

In his brief, Appellant cites to several instances of documented complaints of back pain made to private examiners in 1993, 1994, 1995, and 1998, which he contends directly contradict the basis for the VA examiner's opinion and, further, establishes a continuity of symptoms since the 1989 surgical procedure, not addressed by the VA examiner. *See* (App.Br. at 8-10). However, as demonstrated above, the VA examiner clearly opined that Appellant suffered no injury in service, nor was there a neurological component to the February 1991 lumbar strain, and, moreover, clinical evaluation of the back in April was normal. [R. at 31, 36-37]. The 1993 private treatment record clearly refers only to gastrointestinal problems experienced by Appellant [R. at 476]; complaints of low

back pain in 1994 were not associated with any limitation in either range of motion or straight leg raising testing, and no diagnosis was forthcoming [R. at 477]; diagnoses of back strain in February 1995 were determined to have "almost completely resolved," with no documentation of any follow-up treatment of record [R. at 479-81]; and complaints of back pain in 1998 were expressly noted to have no neurological involvement [R. at 483]. Moreover, as indicated, the documentation referred to by Appellant dated in September 1995, refers to the treatment received one year prior, and was part of the evaluation made in connection with Appellant's retention clearance. *See* [R. at 367 (367-75)]. The VA examiner specifically acknowledged his consideration of this evidence in rendering his opinion [R. at 38], and, moreover, none of the reports cited by Appellant as showing intermittent complaints of pain since service, identify any underlying diagnosed condition, and none relate the reported pain to the in-service "blood patch." *See, e.g., Sanchez-Benitez v. West,* 13 Vet.App. 282, 285 (1999) ("pain alone, without a diagnosed or identified underlying malady or condition, does not in and of itself constitute a disability for which service connection may be granted.").

Absent evidence that Appellant, or his counsel, possess medical expertise or other similar evidence of record, his attempts to offer his interpretation of the significance of the medical evidence, to include what he attempts to identify as any on-going residual effects associated with the ameliorative procedures undertaken at the time of the 1989 in-service surgical procedure, as well as the

medical opinion provided by the December 2014 VA examiner, amounts to nothing more than lay hypothesizing, and, as such should be rejected. *See Hyder v. Derwinski,* 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."); *see also Kern* and *Monzingo*, both *supra.* The Board fully explained its reliance on the December 2014 VA examiner's opinion, to include its determination that there was otherwise no competent evidence of record to support a nexus between Appellant's current back disability and his active duty complaints and treatment of back pain. *See* [R. at 8-9 (1-11)]. Given the above, the Court should reject Appellant's contentions of error and affirm the Board's decision.

V. CONCLUSION

In light of the foregoing reasons, the Court should affirm the August 7, 2014, Board decision.

Respectfully submitted,

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